

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Telecommunications Relay Services)	
And Speech-to-Speech Services for)	CC Docket No. 98-67
Individuals with Hearing and Speech)	
Disabilities)	

To: The Commission

COMMENTS OF HAMILTON RELAY, INC.

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SUMMARY

Hamilton Relay, Inc. (“Hamilton”) is responding to the Petitions for Reconsideration filed by Sprint and MCI in this proceeding. Sprint and MCI have asked the Commission to reverse the well-founded decision in the *Order on Reconsideration* to deny cost recovery for IP Relay services provided prior to the grant of various waivers on March 14, 2003. Hamilton supports the Commission’s decision and urges it to affirm the *Order on Reconsideration’s* denial of retroactive cost recovery, because the decision will serve the public interest by fostering competition in the IP Relay market.

In addition, Hamilton requests that the Commission clarify that all pre-waiver disbursements to IP Relay providers were unauthorized and must be recouped, since it is clear from the record in this proceeding that no IP Relay provider was capable of offering the mandatory minimum standards prior to the grant of waivers on March 14, 2003.

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Hamilton Relay, Inc. ("Hamilton"), hereby submits these comments for two purposes: (1) to resubmit its comments filed on April 28, 2003 in response to the Petition for Limited Reconsideration ("Sprint Petition") filed by Sprint Corporation ("Sprint") on April 14, 2003 in the above-captioned proceeding;¹ and (2) to address the issues raised in the Petition for Clarification and/or Reconsideration ("MCI Petition") filed by WorldCom, Inc. d/b/a MCI ("MCI") on May 16, 2003.² Because Hamilton's April 28 comments were filed without the opportunity to respond to MCI's Petition, Hamilton respectfully requests permission to withdraw the April 28 comments and replace them with comments made herein.

¹ Sprint refiled its submission on April 24, 2003.

² The Commission invited comments on the Sprint and MCI petitions by Public Notice dated May 22, 2003. See *Petitions for Reconsideration of Action in Rulemaking Proceedings*, Public Notice, Report No. 2608 (May 22, 2003). Public notice of the Sprint and MCI petitions appeared in the *Federal Register* on May 30. See 68 Fed. Reg. 32,511 (May 30, 2003).

I. Introduction

On April 22, 2002, the Commission released its *Declaratory Ruling and Second Further Notice of Proposed Rulemaking* (“IP Relay Order”), which set forth the minimum standards for Internet Protocol (“IP”) Relay providers of Telecommunications Relay Services (“TRS”).³ In the *IP Relay Order*, the Commission waived certain standards for IP Relay providers for a one-year period, but required that hearing carryover (“HCO”) and 900 (or pay-per-call) services be provided by IP Relay providers.⁴ The Commission held that any provider of IP Relay services that was unable to provide 900 services or HCO would be ineligible to recover costs from the Interstate TRS Fund, unless the IP provider sought and obtained a waiver of those standards.⁵

As a result of the Commission’s decision, Hamilton did not commence its IP Relay services, because Hamilton was unable to certify to the Fund Administrator that it was providing HCO and 900 services, and thus was unable to recover its costs from the Interstate TRS Fund. Hamilton, like all other IP Relay providers, is unable to provide one-line HCO and 900 services because it is not technically feasible to do so at this time. Accordingly,

³ In the Matter of Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, *Declaratory Ruling and Second Further Notice of Proposed Rulemaking*, CC Docket No. 98-67, FCC 02-121, 17 FCC Rcd 7779 (2002) (“*IP Relay Order*”).

⁴ *Id.* paras. 32, 34.

⁵ *Id.* para. 33.

Hamilton joined others in urging the Commission to waive the HCO and 900 requirements.

While Commission reconsideration of the *IP Relay Order* was pending, other providers, in contrast to Hamilton, commenced IP Relay services despite their inability to provide one-line HCO and 900 services. Some even received compensation from the Interstate TRS Fund upon certifying that they were an “eligible provider” without disclosing that they were not providing HCO and 900 services as required.⁶ Sprint did not receive reimbursement for its services because it disclosed that it could not provide HCO and 900 services.⁷

In sum, by March 2003, two IP Relay providers had received substantial cost recovery for nearly a year, despite their inability to comply with Commission rules.⁸ Sprint elected to provide the service knowing that it was not compliant with the Commission’s rules. Hamilton, recognizing that the Commission had required that one-line HCO and 900 service be offered as part of the conditions of service, withheld its entry into the IP Relay market and waited for Commission action on the industry’s request for waivers of the HCO and 900 requirements.

⁶ Sprint Petition at 6.

⁷ *Id.* at 5-6.

⁸ In *ex parte* comments filed on December 2, 2002, Hamilton noted that in August 2002 alone, the TRS Fund Administrator paid over \$45,000 per day to IP Relay providers. See Letter to Marlene H. Dortch from Margot Smiley Humphrey, Counsel for Hamilton Relay, Inc., at 2 (Dec. 2, 2002) (“Hamilton December Letter”).

On March 14, 2003, the Commission released its *Order on Reconsideration* in this proceeding.⁹ In that decision, the Commission, among other things, granted a five-year prospective waiver of the one-line HCO and 900 service requirements to all IP Relay providers.¹⁰ The Commission, however, denied cost recovery for past IP Relay services rendered in violation of the then-applicable mandatory minimum standards.¹¹

The five-year waiver of HCO and 900 services became effective upon the release date of the *Order on Reconsideration*, which was March 14, 2003. Hamilton immediately initiated IP Relay services upon the release of the *Order on Reconsideration*. Hamilton has been providing IP Relay services nationwide since March 14, 2003 and has requested cost recovery from the Interstate TRS fund for services provided as of that date.

On April 14, 2003, Sprint filed its Petition seeking reconsideration of the Commission's decision to deny retroactive cost recovery. MCI filed its Petition on May 16, 2003 and the Commission released a Public Notice on May 22, 2003 regarding both Petitions. Hamilton now submits these timely Comments in response to the issues raised in the Petitions, and to seek clarification of the

⁹ In the Matter of Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, *Order on Reconsideration*, CC Docket No. 98-67, FCC 03-46 (rel. Mar. 14, 2003) ("*Order on Reconsideration*").

¹⁰ *Id.* paras. 18, 22, 25. IP Relay providers must submit an annual report during the five-year waiver period. *Id.* para. 22.

¹¹ *Id.* para. 27.

way in which the Commission will implement its denial of cost recovery for the period prior to the effective date of the *Order on Reconsideration*.

II. The Commission Rationally Decided to Treat All IP Relay Providers Similarly

Hamilton welcomes the opportunity to provide IP Relay services to persons with hearing and/or speech disabilities. Hamilton supports the Commission's decisions in the *Order on Reconsideration* because they have allowed Hamilton to commence important TRS services via IP Relay.

Hamilton also supports the Commission's decision to deny pre-waiver cost recovery. The grant of such recovery to some providers would unjustly penalize those providers that determined in April 2002 that they were unable to comply with Commission rules and therefore did not commence IP Relay service until the release date of the *Order on Reconsideration*. The Commission's decision has rationally created a level playing field by instituting a certain date (i.e., March 14, 2003) for the commencement of cost recovery for *all* IP Relay providers.

In this regard, Hamilton supports Sprint's argument that Interstate TRS funds should not be distributed in a discriminatory manner.¹² Hamilton agrees with Sprint that it would be manifestly unjust to favor IP Relay

¹² Sprint Petition at 19 (citing *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)).

providers that received compensation improperly. It would be similarly unjust to discriminate against IP Relay entities that did not enter the IP Relay market knowing that they could not comply with then-existing rules.

Hamilton and Sprint differ on the method of resolving the discrimination, however. To the extent that the Sprint Petition seeks cost recovery for IP Relay services provided prior to March 14, 2003, Hamilton does not support the Petition. The better approach, and the one that appears to have been adopted by the Commission in the *Order on Reconsideration*, is to deny cost recovery to all IP Relay providers for services provided prior to the effective date of the five-year waivers. In denying cost recovery for all IP Relay services provided prior to March 14, 2003, the Commission has rationally decided to treat all providers similarly and create a marketplace in which no provider has been given a discriminatory, competitive advantage over other IP Relay providers.

Sprint, in its Petition, questions the Commission's reliance on the *Bowens* and *McElroy* decisions in support of the Commission's decision to deny retroactive cost recovery. However, Sprint offers no direct legal support for authorizing retroactive cost recovery for carriers that were not in compliance with Commission rules at the time that service was rendered.¹³ Accordingly,

¹³ Sprint submits that there is precedent for Commission grant of a retroactive waiver, citing, for example, the *Rath Microtech* decision. *Rath Microtech v. Electronic Micro Systems, Inc.*, 16 FCC Rcd 16,710 (2001) (Commission did not take enforcement action against elevator telephone manufacturer for selling non-compliant equipment). However, the Commission's refusal to take enforcement action against an individual entity is far different than a Commission decision affirmatively authorizing retroactive cost recovery for some carriers but not others. Indeed, in all of the other cases cited by Sprint, (continued...)

Hamilton submits that the Commission was fully justified in denying retroactive cost recovery.

III. The Commission Should Not Unjustly Enrich Certain IP Relay Providers

It is clearly a part of the record in this proceeding that certain IP Relay providers received compensation from the Interstate TRS Fund, despite their failure to provide one-line HCO and 900 services and lack of a waiver for providing such services.¹⁴ The Commission's *Order on Reconsideration* denied

no party was harmed by the Commission's grant of a retroactive waiver. Here, in contrast, Hamilton would be unjustly harmed for having complied with the Commission's decision in the *IP Relay Order* by not seeking cost recovery, knowing that to do so would violate Commission rules. Moreover, Hamilton submits that the *Publix Show Cause Order* cited by Sprint and MCI is not applicable in this situation, and that Sprint and MCI have interpreted the decision's holding far too broadly. The *Publix Show Cause Order* mandated an evidentiary hearing at which an Administrative Law Judge must assess whether Publix is a legitimate TRS provider and substantially complied with TRS minimum standard requirements. *Publix Network Corporation, Order to Show Cause and Notice of Opportunity for Hearing*, EB Docket No. 02-149, 17 FCC Rcd 11,487, FCC 02-173, para. 20 (rel. June 19, 2002) ("*Publix Order*"). The *Publix Order* does not stand for the assertion, as Sprint and MCI seem to suggest, that a provider may ignore specific minimum standards and still claim substantial compliance with Commission rules. There is no room for arguing that a provider is in "substantial compliance" with minimum standards if it does not provide two of the standards specifically required by the Commission in the *IP Relay Order*. The inability to provide one-line HCO and 900 services cannot be viewed as "minor deviation[s]." *Publix Order*, para. 19. Indeed, it is clear from the record that Sprint recognized in July 2002 that it did not substantially comply with the minimum standards, because Sprint specifically requested a waiver of those standards. As set forth more fully below, MCI also admitted it did not comply with minimum standards, even though it later attempted to retract that admission. Sprint and MCI cannot legitimately argue now that they "substantially complied" with minimum standards even though they did not offer two services specifically mandated by the Commission.

¹⁴ See Sprint Petition at 6-7; Letter to Marlene H. Dortch from Michael B. Fingerhut, General Attorney for Sprint, at 2 & attachment p. 6 (Oct. 31, 2002); (continued...)

cost recovery and refused to grant retroactive waivers “for past services rendered in violation of the then-applicable mandatory minimum standards”¹⁵ However, the Commission’s *Order on Reconsideration* is unclear as to how the Commission will deny cost recovery to those providers that have already received compensation from the Fund because they did not disclose that they were not in compliance.

In light of the numerous and varied references in this proceeding to the existence of improper disbursements to ineligible IP Relay providers, Hamilton submits that the record is clear, and that the Commission can seek reimbursement of any funds improperly disbursed. Hamilton requests that the Commission clarify that all funding disbursed to IP Relay providers prior to March 14, 2003 was improperly disbursed. Most (if not all) carriers agree, and the Commission concurs, that no IP Relay provider was or currently is capable of providing one-line HCO and 900 services. Any IP Relay providers that received pre-waiver funding were thus issued the funding in error, and there should be a true-up. Therefore, those providers should be required to disgorge all cost recovery received from the Interstate TRS Fund for IP Relay services provided prior to March 14, 2003. Rather than instituting costly and time-consuming enforcement proceedings, Hamilton suggests that the most efficient

Hamilton December Letter at 2; AT&T Comments August 13, 2002, at 2 (noting infeasibility of providing 900 service); *id.* at 6 (indicating that HCO capabilities are as yet undeveloped); Letter to Marlene H. Dortch from Larry Fenster, Senior Economist for WorldCom, at 1 (Nov. 20, 2002) (noting that pay-per-call and HCO would be offered by providers “once they [become] feasible”); Reply Comments of Hamilton, at 7.

method for handling the disgorgement process would be to withhold future cost recovery from each provider that received pre-waiver cost recovery, until the balance withheld equals that provider's pre-waiver recovery amount. In this way, the Commission will ensure that certain providers are not unjustly enriched for having violated Commission rules.

IV. MCI Has Admitted that It Did Not Provide HCO as Required

MCI is on record as having stated that it did not provide HCO as required. In a November 20, 2002 letter from Larry Fenster to Marlene Dortch, MCI admitted that HCO was required and infeasible. MCI specifically requested in the letter that the Commission "reimburse providers who have been offering all mandated IP Relay services *other than HCO and pay-per-call*, from the date on which they began completing IP Relay calls. *Id.* (emphasis added). MCI subsequently adopted the novel approach that 2-line HCO would satisfy the minimum standards. However, this argument is unsupported by any provision of the *IP Relay Order*. While the Commission specifically discussed 2-line Voice Carryover ("VCO") in the *IP Relay Order*,¹⁶ there is no corresponding discussion of 2-line HCO. Absent a specific allowance for 2-line HCO, the Commission's rules must be read to require one-line HCO.

Moreover, the Commission's definition of HCO in the rules can only be read to mean one-line HCO. Section 64.601(7) defines HCO as "[a] reduced form of TRS where the person with the speech disability is able to listen to the

¹⁵ *Order on Reconsideration*, para. 25.

other end user and, in reply, the CA speaks the text as typed by the person with the speech disability. The CA does not type any conversation.”¹⁷ The rules simply do not contemplate provision of HCO over two lines. Indeed, the Commission has separately defined two-line HCO: “Two-line HCO, most commonly used by persons who are able to hear but have impaired speech, works similarly to two-line VCO, except that one line is being used for hearing (the CA does not type the words of the other party) and the other line is used by the two-line HCO user.”¹⁸ TRS providers will soon be required to provide two-line HCO, but it is clear that at the time that Section 64.601(7) and the *IP Relay Order* were adopted, the only method for complying with the HCO minimum standard was to provide one-line HCO. Because MCI failed to provide this minimum standard, MCI cannot legitimately argue that it is entitled to pre-waiver cost recovery.

V. The Public Interest Is Best Served By Encouraging Competition in the IP Relay Market

When the Commission authorized IP Relay as an eligible TRS service, it indicated that IP Relay was a valuable addition to TRS that “may encourage competition in TRS, a regulated service that typically has only one provider per state.”¹⁹ Hamilton agrees. TRS users should benefit from the addition of

¹⁶ *IP Relay Order* para. 9.

¹⁷ 47 C.F.R. § 64.601(7).

¹⁸ *Telecommunications Relay Services Rules Modified, Comments Sought on Emerging Technology. Public Outreach Campaign and National Security Status of TRS*, News Release at 2 (rel. May 15, 2003).

¹⁹ *IP Relay Order* para. 26.

multiple vendors into the national market. However, the surest way to upset the competitively neutral environment fostered by the Commission's *IP Relay* decision would be to allow pre-waiver cost recovery. The Commission should not agree to create further market distortions by authorizing pre-waiver cost recovery. Rather, the Commission should remove any anti-competitive elements still present in the IP Relay market. The most blatant anti-competitive element in the IP Relay market now is the evidence of pre-waiver disbursements of Interstate TRS funds to providers that did not, and could not, comply with all TRS minimum standards prior to the five-year waiver grant. Hamilton urges the Commission to complete the process of removing any anti-competitive elements by enforcing the terms of the *Order on Reconsideration*.

The Commission also should avoid creating barriers to entry into the IP Relay market. Hamilton submits that Commission inaction on improper cost recovery will create significant barriers to entry into the IP Relay market. One such example is Hamilton choosing not to enter the IP Relay market until the Commission issued the one-line HCO and 900 service waivers. Carriers such as Hamilton simply would not gamble that the Commission would issue retroactive cost recovery. The fact that larger carriers could assume the risk of not recovering their costs is merely indicative of the already significant barriers to entry faced by non-incumbent carriers.

Finally, the Commission should ensure a competitive environment by providing carriers with regulatory certainty. In this case, a retroactive waiver to enable cost recovery would create extraordinary uncertainty and leave open

the possibility of such arbitrary decisions in the future. To ensure regulatory certainty going forward, the Commission should avoid any retroactive application of its waivers.

VI. Users Demand Quality Service and Depend on Commission Enforcement of Existing Rules in Order to Maintain Quality of Service

In the end, regardless of whether the Commission authorizes or denies pre-waiver cost recovery, one set of parties stands to lose. As a broader matter of public policy, however, the Commission should not reward noncompliance with its rules by allowing providers to retain pre-waiver disbursements. At the same time, the Commission should not penalize providers for obeying Commission rules and the statutory requirement for functionally equivalent services.

The Commission and users of TRS should be cautious of the slippery slope presented by the rationale of the *Publix Order*. Carriers relying on this precedent are in effect asking the Commission to look the other way at their failure to provide all required minimum standards and to allow cost recovery regardless. Users of TRS services demand and deserve high quality service; they look to the Commission to enforce its existing rules to ensure the continued quality of that service. However, any unjustified cost recovery by noncompliant providers sets a dangerous precedent for the future provision of TRS services. Specifically, TRS providers may be led to believe that they may

ignore various Commission rules and still claim that they are “substantially compliant” and thus deserving of Interstate TRS funding. If the Commission were to allow providers to retain unjustified disbursements, it would potentially degrade the overall quality of TRS services and would send an improper signal to carriers that carriers can violate Commission rules and fail to make full disclosure without risk of penalty. Users of TRS services deserve the best service possible, and the Commission should foster an environment in which providers strive to provide the best service possible by complying with required minimum standards. It is of paramount importance that carriers comply with Commission rules and that carriers failing to do so should not be rewarded. That is the ultimate rationale for the Commission’s decision in the *Order on Reconsideration*, and Hamilton agrees with the decision.

VII. Conclusion

For the reasons set forth above, Hamilton supports the Commission’s decision in the *Order on Reconsideration*. Hamilton concurs with Sprint that the Commission must avoid discriminatory treatment of IP Relay providers. To this end, Hamilton urges the Commission to clarify that all Interstate TRS funding disbursed to IP Relay providers prior to March 14, 2003 was improperly disbursed and must be recouped. In this way, the Commission will ensure that a competitively neutral market exists for TRS, that providers understand and follow Commission rules, and that TRS users continue to receive the best quality service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David A. O'Connor, hereby certify that copies of the foregoing Comments were sent on this 16th day of June, 2003, via first-class mail, postage prepaid (or as otherwise noted), to the following:

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